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**Before the Subcommittee on Commerce, Manufacturing, and Trade
Committee on Energy and Commerce
U.S. House of Representatives
Hearing on
“Oversight of the Consumer Product Safety Commission”
May 19, 2015**

Chairman Burgess, Ranking Member Schakowsky, distinguished Members, thank you for providing the opportunity to discuss the statutory framework for rulemaking at the U.S. Consumer Product Safety Commission (CPSC) in connection with your hearing entitled “Oversight of the Consumer Product Safety Commission.”

I served as the general counsel of the CPSC during the implementation of both the Virginia Graeme Baker Pool and Spa Safety Act (VGBA) and the Consumer Product Safety Improvement Act (CPSIA). The VGBA addressed the risk of entrapment deaths in public pools and spas by mandating compliance with a voluntary safety standard for drain covers, among other things. Among the many improvements the CPSIA brought to consumer safety were provisions, such as the Danny Keysar Child Product Safety Notification Act, that required the CPSC to incorporate voluntary safety standards as mandatory law. The CPSIA also mandated that certain standards, such as the voluntary standard for toy safety, be considered consumer product safety standards by law. I have been asked to discuss the way the CPSC statutes interrelate to the voluntary standards process to inform the Committee’s consideration of H.R. 999.

My testimony will address with specificity the legal framework currently in place to protect consumers from risks of injuries on consumer products, such as recreational off-highway vehicles (ROVs), regulated by the Commission under the authority of the Consumer Product Safety Act (CPSA). *See* [15 U.S.C. 2052\(a\)](#). Section 7 of the CPSA authorizes the Commission to promulgate a mandatory consumer product safety standard that sets forth performance requirements for a consumer product and also allows the CPSC to provide for product markings and clear and adequate warnings or instructions. In order to promulgate a rule under section 7, the Commission must find the rule reasonably necessary to prevent or reduce an unreasonable risk or injury. *Id.*

Section 9 of the CPSA specifies the process the CPSC follows to issue a consumer product safety standard under section 7. One of the significant changes in the CPSIA was section 204, which expedited rulemaking by eliminating the need to conduct rulemaking using an Advanced Notice of Proposed Rule (ANPR) and allowing the Commission to proceed directly to a Notice of Proposed Rule in the appropriate circumstances. Regardless of which path the Commission chooses, section 9(f)(1), requires that the Commission consider, and make appropriate findings to be included in the rule, concerning the following issues: (1) the degree and nature of the risk of injury that the rule is designed to eliminate or reduce; (2) the approximate number of consumer products subject to the rule; (3) the need of the public for the products subject to the rule and the probable effect the rule will have on utility, cost, or availability of such products; and (4) the means to achieve the objective of the rule while minimizing adverse effects on competition, manufacturing, and commercial practices. *Id.* 2058(f)(1). To issue a final rule, the Commission must find that the rule is “reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with such product” and

that issuing the rule is in the public interest. *Id.* 2058(f)(3)(A)&(B). The Commission also must find that the expected benefits of the rule bear a reasonable relationship to its costs and that the rule imposes the least burdensome requirements that would adequately reduce the risk of injury. *Id.* 2058(f)(3)(E)&(F).

In addition, the ANPR rulemaking process, which was followed by the CPSC in connection with ROVs, invites stakeholders to submit existing voluntary standards or a statement to develop or modify a voluntary standard as part of the rulemaking process. The Commission can proceed to make the voluntary standard mandatory if it will eliminate or reduce the risk of injury. *Id.* 2058(b)(1). If a voluntary standard addressing the risk of injury has been “adopted and implemented,” to proceed with its own rulemaking on the same risk, the Commission must find that: (1) the voluntary standard is not likely to eliminate or adequately reduce the risk of injury, or (2) it is unlikely that there will be substantial compliance with the voluntary standard. *Id.* 2058(f)(3)(D). If those findings cannot be made, the rule cannot move forward. Under the CPSA and its implementing regulations, the Commission has “relied” on a voluntary product safety standard if, after commencing a consumer product safety standard rulemaking under section 9 of the CPSA by an ANPR, it terminates the rulemaking based on explicit findings that an existing voluntary consumer product safety standard will yield adequate reduction in the risk under consideration and that it is likely there will be substantial compliance with the voluntary standard. Alternatively, the Commission could terminate the rulemaking and simply defer to the voluntary standard, which is an option the Commission has used in response to petitions for rulemaking.

The legislative history of section 9 directs the CPSC, in considering whether a voluntary standard will eliminate or adequately reduce the risk in question, to study “whether the risk will

be reduced to a sufficient extent that there will no longer exist an unreasonable risk of injury.” House Conference Report No. 97-208, July 29, 1981 [to accompany H.R. 3982] at p. 873. The Commission uses a variety of experts in different directorates and disciplines to help provide the factual support for these findings. Among the more difficult issues for the CPSC to address is whether there will be substantial compliance with a voluntary standard, particularly in today’s economy when so many products are manufactured around the globe. The legislative history of section 9 is also instructive on the finding of substantial compliance and directs that the CPSC consider whether “there will be sufficient compliance to eliminate or adequately reduce an unreasonable risk of injury in a timely fashion.” *Id.* Moreover, compliance must be measured in terms of the number of complying products rather than in terms of the number of complying manufacturers. *Id.* All of the findings by the Commission staff are provided to the public during the notice and comment period for stakeholder input.

The challenges of making voluntary standards mandatory law is one of the most important lessons learned during the VGBA and CPSIA implementation processes. Voluntary standards are iterative. They evolve over the course of years and can be adapted as needed when issues arise. When made mandatory, aspects of the voluntary standard which may be subject to differing interpretations, such as test procedures and methods, can create compliance challenges. It can create new legal obligations and testing costs with respect to aspects of the standard that add very little to overall safety and risk reduction. And it can result in mandatory reporting requirements, agency enforcement action, and other legal ramifications, such as impacting the enforceability of indemnity provisions in a sales contract or insurance coverage in the event of an accident. Uncertainty in the industry as to the meaning of certain provisions in the VGBA test methodology resulted in a significant recall of drain covers several years after the law went into

effect and after significant expense had been incurred by good actors attempting to comply with the law and install new drain covers. A voluntary standard that becomes law requires much more scrutiny from whether test methods are replicable to whether the requirements are based in sound science and will act to reduce the risk of injury.

I hope these comments on the legal framework have been useful. Thank you again for the opportunity to testify today, and I will be happy to answer any questions.